

Ch. 11: Protection of the Global Environment

pp. 1226-1227: The Kigali Agreement: Using the Montreal Protocol to Phase out Ozone-depleting Substances that Are Greenhouse Gases; Mexichem decision jeopardizes U.S. compliance

As noted in the casebook (pp. 1226-1227), in October 2016 the 28th Conference of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, meeting in Kigali, Rwanda, agreed to a global phase out of hydrofluorocarbons, a potent set of greenhouse gases that also are ozone-depleting substances. It is estimated that these measures alone may slow global warming by as much as 0.5C. This is a tremendous achievement that is the product of years of meticulous diplomacy. The Montreal Protocol already has been responsible for greater reductions in greenhouse gas emissions than even the Kyoto Protocol. The new measures will help reduce the impact on climate change of the rapid growth of air conditioning use in developing countries.

However, as noted on p. 1227 of the casebook, a divided panel of the D.C. Circuit in an opinion by current Supreme Court nominee Judge Brett Kavanaugh held that EPA does not have the authority to require replacement of HFCs under Title VI of the Clean Air Act. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017). This decision by Judge Kavanaugh and its implications for the new Justice's views on administrative law are discussed in Robert V. Percival, Judge Kavanaugh's Activist Vision of Environmental Law, *The Regulatory Review*, Sept. 4, 2018, <https://www.theregreview.org/2018/09/04/percival-judge-kavanaugh-activist-vision-administrative-law/>. The publisher's spellcheck apparently changed "Fluor" to "Flour" - the first typo we have discovered in the 8th edition. Both the manufacturers of the vast majority of refrigerators and air conditioners in the U.S. and the Natural Resources Defense Council sought Supreme Court review of this decision. They argued that under the "safe alternatives policy" of Section 612 of the Clean Air Act, the Environmental Protection Agency has the authority to prohibit the use of a less-safe substitute for an ozone-depleting substance in favor of a safer alternative, even if a company already had begun using the less-safe substitute. They also maintained that EPA has authority under Section 612 of the Clean Air Act to prohibit the use of dangerous but non-ozone-depleting substitutes by any person, including by product manufacturers who began using such substitutes before the EPA placed them on the prohibited list. However, the Supreme Court denied cert on October 9, 2018.

Climate Change Litigation

Professor Michael Gerrard of the Columbia University School of Law maintains a website tracking these cases at: <http://www.climatecasechart.com/> Columbia's Center for Climate Change Law has a blog on climate change at: <http://blogs.law.columbia.edu/climatechange/>